STATE OF MICHIGAN

COURT OF APPEALS

LINDA SUE LEAGUE, Plaintiff-Appellee,	UNPUBLISHED October 19, 2006
v	No. 261058 Genesee Circuit Court
ROBERT RAY LEAGUE, Defendant-Appellant.	LC No. 02-241701

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce that dissolved his marriage to plaintiff. We affirm.

I. Facts and Procedural History

The parties were married on October 29, 1988. They have two minor children, Charles R. League, born May 17, 1990, and Lauren G. League, born July 26, 1991.[1] On August 30, 2001, plaintiff filed a complaint for divorce, but dismissed it on September 6, 2001. On or about July 1, 2002, the parties separated again. On July 11, 2002, plaintiff met with her attorney to begin divorce proceedings, and on July 13 she took her two children to her sister's home. On the night of July 13, 2002, while the parties' home was unoccupied, defendant set fire to it destroying the home and all of its contents. The next day, Defendant was arrested and charged with arson.[2] On July 15, 2002, plaintiff signed the complaint for divorce that underlies this appeal.

[1] Custody of the children was not an issue during the trial, nor is it on appeal.

[2] The result of the criminal proceeding against defendant was an order of probation and an order of restitution to Safeco Insurance Company, which had paid $294,072.13 in insurance benefits after the parties' marital home was destroyed by fire. Safeco intervened as a plaintiff in the divorce action to protect its statutory lien on defendant's property, but is not a party to this appeal.

The divorce trial was conducted on twelve days between May 12 and June 4, 2004. On November 4, 2004, the court issued the opinion that led to the final judgment of divorce. The final judgment of divorce was entered on December 9, 2004. Defendant's motion for reconsideration was denied, and he filed this appeal.

Defendant's issues on appeal all relate to what he suggests is an inappropriate or inequitable valuation and division of assets, and award of support. These arguments in turn are all underscored by defendant's argument that the trial court's finding as to fault in the breakdown of the marriage was erroneous, so we will address that issue first.

II. Fault

As to fault in the breakdown of the marriage, the court stated:

> The Court does not believe it necessary, nor significant, to ascertain the precise reason for the breakdown of this marriage separate and apart from whatever part fault plays in the distribution of the marital estate in this case. Defendant had affairs. Plaintiff took him back reluctantly. Plaintiff had an affair and fell in love. Defendant burned down the most valuable asset the parties owned. Technically speaking, both parties are at fault. Yet in the Court's view, what Defendant is actually asking the Court to do is mitigate Defendant's misconduct in burning down the house by juxtaposing it with Plaintiff's misconduct of infidelity. If Defendant is asking the Court to excuse Defendant's conduct because of Plaintiff's conduct, the Court is unable to do so, if accepting Defendant's position means the Court is to blame anyone but Defendant for the destruction of the marital estate.

Defendant argues on appeal that it was unfair for the court to find the fault for the marriage breakdown lies more with defendant. Specifically, defendant states:

> The truth is that the Defendant's improprieties had nothing whatever to do with the breakup of the marriage. He testified that these were mere encounters . . .. The same cannot be said for Plaintiff's involvement with Springsteen. The sexual romp went on for weeks before the breakup and were [sic] not concealed from Defendant but involved their plans for her leaving the home.

Defendant argues that plaintiff's affair was "a full-scale assault upon the marriage itself," and that defendant was "awash in tears at the very idea of it." Defendant characterizes the ensuing act of arson as "a dramatic howl of grief." Defendant argues that the fault underlying "the house burning and the subsequent demise of the business" is not "the fault of an ill man, reacting to the stimulus that was so casually and cruelly inflicted," but was rather "the fault of a disparate [sic] housewife who had found a sexually gratifying partner and didn't give a damn about the consequences." Defendant argues that because the fault is plaintiff's, "then the legal consequences must be far different from those found by the trial court herein."

Defendant further theorizes that "[i]f the Plaintiff had poisoned Defendant and so rendered him incapable of rational thought, and the disasters had followed as they did in the instant case, no doubt the result would have been quite different." Defendant adds "[t]hat the

Court was unable to see that her actions and conduct had quite the same affect [sic] as poisoning is a failure of imagination and reasoning which has produced yet another disaster in the findings of the Court."

We disagree. We agree with the trial court that it is difficult to take seriously defendant's contention that his wife's affair so outraged him as to make his act of arson her fault when indeed he had conducted numerous affairs himself during the course of the marriage. We find illogical, and distasteful, defendant's attempts to characterize his conduct as different from his wife's conduct for the reason that he never intended his affairs to end the marriage, while she did. We find puzzling defendant's suggestion that the trial court should have, and this Court should now, consider the alternative scenario where defendant's conduct resulted from being physically poisoned by his wife. In short, we find no error in the trial court's assessment of fault in the breakdown of this marriage.

III. Valuation of the Business

In dividing the parties' assets, the trial court started with the premise that the two most valuable assets were the property where the marital home had stood (the Perry Road property) and two businesses the parties owned.[3] Defendant argues that the trial court erred in setting the value of the business at $202,000 because the date selected for valuation was before the business took significant downturns.

In this case, the court order directing an evaluation of the businesses set an appraisal date of July 15, 2002. The court noted that it was not bound to follow the date set by a predecessor judge in this matter because the determination of the appropriate date is a matter of discretion for the trial court. *Byington v Byington*, 224 Mich App 103, 114 (1997). The court concluded, however, that the date selected by the prior judge was appropriate because it reflected the value before the divorce complaint was filed. The court stated:

> As the divorce process continues, or acrimony and dispute arise, the parties, whether through neglect, intention, indeed even sabotage, can significantly affect the value of the asset. The true measure of the business flows from an absence of those external factors, especially where, as here, the extreme emotion incurred in their marital relationship led to the affirmative destruction of a significant portion of the marital estate.

The court added that while defendant sought to have the valuation determined at a later date, there was "an insufficient record" upon which to base a later evaluation.[4] After July 15, 2002,

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[3] During the marriage, the parties operated two business related to repossession of vehicles, Creditco Collections and RepoBrokers; both corporations were formed and held solely in defendant's name. Because the businesses are so closely linked, throughout this opinion, the businesses will be referenced in the singular.

[4] We note also that defendant admitted at trial that, on the advice of his attorney, he failed to assist the evaluator charged by court order with evaluating the business. Because defendant had
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when defendant burned down his marital home, the business indisputably lost clients, but the court declined to engage in "unwarranted speculation" as to the exact effect the events after July 15, 2002 had on the value of the business. The court also noted that "a drastically lower valuation of the business would not have aided Defendant, because the blame for the business diminution would have been laid at Defendant's, not Plaintiff's, feet."

The court heard evidence as to the value of the businesses from two experts: Bethany Hearn, a CPA who evaluated the businesses as a result of the court's order on January 14, 2003, and David Schneider, a CPA engaged by defendant to analyze Ms. Hearn's conclusions. Ms. Hearn estimated the value at $336,000 as of July 15, 2002, while Mr. Schneider estimated that value at $202,000. The court accepted Mr. Schneider's evaluation, noting that the adjustments he suggested to Ms. Hearn's calculations were "reasonable."

We review the findings of fact underlying a trial court's valuation of an asset for clear error. *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Here, the trial court heard from two experts and chose a valuation in the range established by their testimony. It is noteworthy that the court chose the value at the lowest end of that range, the value advocated by defendant's expert rather than the higher value identified by the expert selected by the parties together. There is no clear error in the trial court's valuation of the asset.

We review the trial court's decision regarding the time of valuation for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). Here the trial court provided a thorough and reasonable explanation for the date chosen, and we find no abuse of discretion.

IV. Division of Assets

Defendant argues on appeal that the division of assets crafted by the trial court was entirely inequitable. In determining that there is a significant divergence in the total value of the share of the marital assets that each party received, defendant asserts that the business has no value and that the child and spousal support awarded should be included as assets for plaintiff and liabilities for defendant. Defendant also calculates what would have happened "[h]ad the house been sold, without the complication of the fire and the insurance factor." And he asserts that the $294,000 he owes Safeco in restitution "is a debt incurred during the course of the marriage."

This Court reviews the trial court's findings of fact for clear error, and if no clear error is found, must then consider whether a ruling based on those facts was fair and equitable. Dispositional rulings should be affirmed unless the Court is left with the firm conviction that the division was inequitable. *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). As

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sole possession of all business records relevant after July 15, 2002, his failure to comply with the court order to cooperate underlies the lack of evidence of value at any time after the selected date.

plaintiff correctly argues, division of assets need not be equal; equitable just means fair under the circumstances. *Nalevayko v Nalevayko*, 198 Mich App 163; 497 NW2d 533 (1993).

As we have already stated, the trial court did not err in finding that fault for the diminution of the estate could be apportioned more to defendant than to plaintiff; this finding may properly be a consideration in the division of marital assets. *McDougal v McDougal*, 451 Mich 80; 545 NW2d 357 (1996).

Here, the trial court stated from the outset that the two primary assets were the Perry Road property and the business. The court awarded the business, valued at $202,000, to defendant, and the property, valued at $218,000, to plaintiff. The court divided the parties' remaining assets in a way that it characterized as "if not precisely equal, at least equitable." We find no error in the court's findings, and we agree that the division was equitable, though not precisely equal.

Defendant's argument that his debt for criminal restitution should be treated as marital debt must fail. The debt to Safeco is a debt defendant created all on his own. A trial court may properly order that one party be required to pay a debt incurred during the course of the marriage if the court determines that the debt or the majority of it was incurred solely by that party. *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990), overruled on other grounds 194 Mich App 284 (1992) (at 400, Noting that "[o]n closer examination, these 'joint debts' are not so 'joint.'"). We note that the courts of this state have not spoken specifically to the issue of whether an innocent spouse may be liable for criminal restitution debt incurred by the partner spouse during the course of the marriage, probably because such an illogical and unreasonable argument has not before been made. We add that we have found just one state court to have squarely addressed this issue, and we cite with approval and adopt the Oklahoma appellate court's disposition of the issue: "We find no abuse of discretion by the trial court's refusal to transfer the burden of Wife's criminal liability to the innocent spouse." *Thompson v Thompson*, 105 P3d 346, 352 (2004).

Likewise defendant's argument that the Court should consider how the value of the marital home would have been divided had he not burned it down is ludicrous. Finally, we also reject defendant's contention that the spousal and child support awarded to plaintiff should somehow count against plaintiff in the division of assets.[5]

Given all of the facts and circumstances of this divorce, we find that the division of property was equitable.

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[5] In addition to the ongoing support payments, defendant appears to argue that support payments made after significant arrearage accrued during the divorce proceedings should be counted as assets for plaintiff and liabilities for defendant. For example, the parties had sold a piece of real property after the divorce complaint was filed, and the court ordered defendant's share to be held in a trust account. During the divorce proceedings, funds were disbursed by the court to plaintiff from this account to cover arrearages. Defendant now argues that it is as if plaintiff received all proceeds from that sale and he received none.

V. Spousal Support

Defendant argues the trial court erred in awarding spousal support because he argues the trial court erred in finding he was comparatively more at fault in the breakdown of the marriage. He further argues there was no valid investigation of weekly or monthly earnings of the parties at the time of the trial; that the business defendant was awarded as his major share of the marital assets is valueless; and that his financial position is further weakened by his debt of $294,000 to Safeco.

"The trial court's decision regarding alimony must be affirmed unless the appellate court is firmly convinced that it was inequitable." *Olson v Olson*, 256 Mich App 619, 630; 671 NW2d 64 (2003).

Here, the court disagreed with plaintiff as to the amount and duration of support requested,[6] but determined that defendant should pay plaintiff $400 per month from June 1, 2004 through June 1, 2005, or until her remarriage, whichever came first. The court based its conclusion in part on its finding that plaintiff's share of the marital estate, while significant, would be used in "replac[ing] many things, including a home," and in part on defendant's greater earning capacity.

Defendant's argument that plaintiff bears the fault for the breakdown of the marriage is without merit, as addressed above. Likewise, his argument that the business has no value is not a sympathetic argument. As defendant stated during the trial, "the business is what you make of it, it's how hard you work." The facts indicate that when plaintiff was last involved in the business, it was successful, and the facts further indicate that defendant insisted on taking over the management of the business himself again when he was released from jail. Defendant's argument that his debt to Safeco must be considered is offset by the trial court's finding that plaintiff could not be required to deplete her assets to cover the replacement costs of the home and possessions destroyed by defendant.

The parties' prior standard of living is just one factor for the court to consider,[7] but here since defendant impacted plaintiff's standard of living so significantly when he burned down the marital home and destroyed all its contents, it seems reasonable to us that the trial court would consider that factor carefully. And the trial court did specifically state that plaintiff's financial position included replacement costs for both a home and the possessions lost in the fire.

We find there is no clear error in finding that, given the circumstances, a small amount of alimony for a short period of time was appropriate. We are not left with the firm conviction that this award of spousal support was inequitable.

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[6] Plaintiff argued for $200 per week for two years.

[7] See *Parish v Parish*, 138 Mich App 546, 554; 361 NW2d 366 (1984).

VI. Child Support[8]

Defendant argues that the court erred in determining an appropriate amount of child support because the court calculated defendant's income potential "without any basis whatsoever."

"Although this Court reviews orders of child support de novo, much discretion is vested in the trial court and the exercise of that discretion generally is presumed to be correct." *Rickel v Rickel*, 177 Mich App 647, 651; 442 NW2d 735 (1989). "The party appealing from the child support order bears the burden of showing a clear abuse of discretion." *Dunn v Dunn*, 105 Mich App 793, 797; 307 NW2d 424 (1981).

The court imputed to plaintiff income of $1300.00 per month, including the $400.00 per month spousal support, and imputed income to defendant of $4500.00 per month, also "tak[ing] into consideration payment of spousal support to the Plaintiff from June 1, 2004, through June 1, 2005." The court set support payments at $867.00 per month when two minor children were eligible for support, and $566.00 per month when only one child was eligible. The child support payments were set to increase, after the spousal support payments ended, to $888.00 per month for two children, and $643.00 for one child. In addition, defendant was required to maintain both children on his health insurance, and was to pay 85% of all uninsured medical, dental, optical, and prescription expenses, while plaintiff was to pay 15% of such expenses.

In determining an appropriate amount of child support, the court considered and rejected both parties' assessments of their own earning capacity as too low and each other's earning capacity as too high. The court imputed potential incomes to both parties based on its assessment of their qualifications for various work, irrespective of their statements about what they would prefer to do. Judge Farah considered defendant's earning capacity based on what the family business had generated in the past. Given the circumstances, the court imputed income based not on the highest level of income the business had previously generated, but on a

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[8] On March 23, 2004, Judge Farah found defendant to be in contempt of court for non-payment of support, but noted defendant could purge the contempt finding by paying $10,000 to plaintiff.

On October 11, 2004, Judge Farah again found defendant in contempt of court for failure to pay child and spousal support. Although plaintiff had claimed the amount owed exceeded $22,000.00, the court ordered that defendant pay $1400.00 by the end of the following day and $150 per week starting the following week or turn himself in at the Friend of the Court. During the hearing, defense counsel suggested plaintiff had filed this show cause motion at this time to sway the judge's ruling in the divorce. Plaintiff's counsel countered that the issue had been raised because defendant had paid only $100 since the last contempt hearing.

On June 7, 2005, plaintiff filed another motion to show cause for contempt, asserting defendant was $12,976.98 in arrearage on child support. On July 18, 2005, Judge Farah adjourned the show cause hearing until September and ordered defendant to pay $1000 by noon on July 21.

On September 21, 2005, Judge Farah issued another contempt order requiring defendant to pay "$150 per week, each week, or a bench warrant will issue for his arrest."

compromise between what plaintiff asserted the business could generate and what defendant asserted it currently did generate. What the court did not do is accept defendant's argument that because he did not want to run the business any longer, the income it could generate could not be imputed to him. The court was correct: "the trial court is not limited to consideration of the parent's actual income and may also look to the parent's unexercised ability to earn." *Wilkins v Wilkins*, 149 Mich App 779, 792; 386 NW2d 677 (1986). To be fair, the court also declined to accept plaintiff's position that since she no longer wished to work as a bookkeeper, the court should not consider the level of income she could earn in that field.

We find no error or abuse of discretion in the trial court's findings and order of child support.

VI. Concealed Property

Defendant argues, finally, that the trial court erred in granting plaintiff sole possession of property she purchased after the parties separated and which she did not disclose during the divorce proceedings.[9] Defendant asserts that per *Sands v Sands*, 442 Mich 30; 497 NW2d 493 (1993), the property at issue should be awarded to him because plaintiff concealed her interest in it. Plaintiff argues that she was afraid to reveal the location of the home to defendant because he had burned down their marital home, and plaintiff adds that defendant also concealed the October, 2003 purchase of a home.

Plaintiff's interest in the property in question was discovered by defendant after trial but before Judge Farah released his opinion. Defendant filed a motion for an evidentiary hearing to address the non-disclosure. The court addressed the issue in its opinion, holding, without further elaboration, that "each party is awarded any real estate purchased after their separation free and clear from any claim by the other party. The Court specifically declines to award Defendant any interest in property acquired by Plaintiff post separation and revealed to the Court post trial."

We find that defendant's reliance on *Sands* is misplaced. The Court in *Sands* held that a party who conceals assets does not automatically forfeit them: "A party's attempt to conceal assets is a relevant consideration, but it is only one of many facts that the court must weigh." *Sands, supra* at 36. The court is not bound by set rules, a set list of factors, or set weighting of factors, but rather is to determine appropriate division of property based on the facts and circumstances of each case. *Id.* at 35. Notably, two factors the court may consider are the "past relations and conduct of the parties," and "general principles of equity." *Id.*

Here, the trial judge specifically found that both parties were "technically" to blame, and specifically declined to accept the two fault-related arguments that defendant proffers again in this Court, that defendant's affairs were different in kind from plaintiff's and therefore did not

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[9] The purchase price paid was $10,000. Plaintiff asserted that she paid half and a friend paid the other half, but during the hearing on defendant's post-trial motion on the concealment issue, plaintiff's counsel neither admitted nor denied that plaintiff had paid the entire purchase price, although the issue arose repeatedly.

contribute to the breakdown of the marriage, and that plaintiff's affair was the cause of defendant's act of arson. The court also found that defendant was more at fault for the diminution of martial assets through his act of arson. The court attempted to divide all marital assets evenly, but declined to include in the marital asset pool any property acquired after the parties separated. In this case, defendant's act of arson is a vivid demarcation of the irretrievable end of this marriage, highlighting as it does the extreme animosity between the parties. There is no error in the trial court's finding that property acquired after that point should be considered separate property.

VII. Conclusion

We find no clear error in the trial court's findings of fact related to valuation and division of assets and award of support in this divorce proceeding. We find no inequity in the trial court's holdings as to division of assets and support obligations. We note that even had our review been de novo, we would have affirmed the conclusions of the trial court.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper